

REMARKS

A Petition for a Two-Month Extension of Time thereby extending the time for responding to the Final Office Action from September 5, 2007 to and including November 5, 2007 is submitted herewith.

A Request for Continued Examination (RCE) is also submitted herewith.

The present Amendment is in response to the Office Action mailed June 5, 2007. Claims 13-16, 18, 20, 21, and 23-26 were rejected in the Action. Claims 13, 16, and 21 have been amended. Claims 27-35 have been added. Therefore, claims 13-16, 18, 20, 21, and 23-35 are currently pending in the present application. Support for new dependent claims 27-35 can be found in Applicants' originally filed disclosure. As such, no new matter has been added. Applicants set forth remarks relating to the Official Action below.

In the Action, the Examiner rejected claims 13, 16, 18, 20, 21, and 23 under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 6,063,121 to Xavier et al. ("Xavier"). The Examiner asserted that Figure 5 of *Xavier* teaches each of the limitations included in the above rejected claims. In the Examiner's latest remarks, he asserted that the language of the claims is not specific as to which plates each of the "curved convex surfaces" and the "curved concave surface" is respectively facing. Applicants have amended certain of the claims to add more specificity.

Applicants respectfully assert that amended independent claims 13, 16, and 21 are unanticipated by *Xavier* because the cited reference neither discloses nor teaches an intervertebral spacer device including a spring or socket having a curved convex surface that extends from a curvate volume and confronts an inner surface of a first plate, the spring or socket having an underside with a curved concave surface that

extends from the curvate volume and is spaced from and confronts an inner surface of a second plate.

Amended claims 13, 16, and 21 recite that the inner surface of the first plate comprises a ball or ball-shaped structure extending therefrom and the inner surface of the second plate has a spring or socket affixed thereto. In the Xavier reference, the plate adjacent to what the Examiner refers to as the "TOP" does not have a ball or ball-shaped structure extending therefrom. Therefore, the plate adjacent to what the Examiner refers to as the "BOTTOM" must be the first plate, which clearly shows a ball or ball-shaped structure extending therefrom. As stated above, amended claims 13, 16, and 21 recite that the "convex surface" of the socket or spring confronts the inner surface of the first plate and the "concave surface" of the socket or spring confronts the inner surface of the second plate. Xavier does not disclose or teach either of these limitations. In contrast, the "convex surface" of the socket or spring in Xavier confronts the second plate and not the first plate. Further, the "concave surface" of the socket or spring confronts the inner surface of the first plate and not the second plate.

For the foregoing reasons, *Xavier* cannot be used to anticipate amended claims 13, 16, and 21. Claims 14-15, 18, 20, and 23-35 are unanticipated, *inter alia*, by virtue of their dependence from the independent claims. A dependent claim is necessarily narrower than an independent claim from which it properly depends.

Further in the Action, the Examiner rejected claims 14, 15, and 24-26 under 35 U.S.C. 103(a) as being unpatentable over *Xavier* in view of U.S. Pat. No. 3,867,728 to Stubstad et. al. ("*Stubstad*"). The Examiner asserted that while *Xavier* does not disclose an external plate surface as having a deflectable/deformable surface thereon, that *Stubstad* does teach

such a feature.

Applicants respectfully assert that claims 14, 15, and 24-26 are unobvious over *Xavier* in view of *Stubstad* because *Stubstad* does not cure the deficiencies of *Xavier* with respect to the "convex surface" of the socket or spring confronting the inner surface of the first plate and the "concave surface" of the socket or spring confronting the inner surface of the second plate limitations. Applicants respectfully request withdrawal of the obviousness rejections of claims 14, 15, and 24-26 over *Xavier* in view of *Stubstad* accordingly.

Further in the Action, the Examiner rejected claims 13, 16, 18, 21, and 23 under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 5,534,029 to Shima ("*Shima*"). The Examiner asserted that Figures 3-5 of *Shima* teach each of the limitations included in the above rejected claims.

Applicants respectfully assert that amended independent claims 13, 16, and 21 are unanticipated by *Shima* because the cited reference neither discloses nor teaches an intervertebral spacer device including a first plate having an inner surface and an exterior surface, a second plate having an inner surface and an exterior surface, wherein said inner surface of the first plate comprises a ball-shaped structure extending therefrom and said inner surface of said second plate has a spring affixed thereto.

In the Action, the Examiner asserted that *Shima* discloses a first plate 5 and a second plate 4. However, first plate 5 of *Shima* does not include an inner surface having a ball or ball-shaped structure extending therefrom. In this case, the Examiner cannot use second plate 4 as the first plate because "spring/socket" 20 does not include a curved convex surface that confronts an inner surface of the first plate. In contrast, if the Examiner were to rather assert that plate 4 is the first plate, then "spring/socket" 20 would have a curved convex

surface that confronts an inner surface of the *second plate* and not the first plate as recited in each of the independent claims.

For the foregoing reasons, *Shima* cannot be used to anticipate amended claims 13, 16, and 21. Claims 14-15, 18, 20, and 23-35 are unanticipated, *inter alia*, by virtue of their dependence from the independent claims. A dependent claim is necessarily narrower than an independent claim from which it properly depends.

Further in the Action, the Examiner rejected claims 13, 16, 18, 20, 21, and 23 under 35 U.S.C. 102(e) as being anticipated by U.S. Pat. No. 5,989,291 to Ralph *et al.* ("*Ralph*"). The Examiner asserted that Figures 3b, 4, 5, and 7-9 of *Ralph* teaches each of the limitations included in the above rejected claims.

Applicants respectfully assert that amended independent claims 13, 16, and 21 are unanticipated by *Ralph* because the cited reference neither discloses nor teaches an intervertebral spacer device including an inner surface of a second plate having a spring affixed thereto.

Amended claims 13, 16, and 21 recite that the inner surface of the first plate comprises a ball or ball-shaped structure extending therefrom and the inner surface of the second plate has a spring or socket affixed thereto. Therefore, in *Ralph*, plate (100b, 200) must be the first plate and plate 100a must be the second plate. However, the inner surface of the second plate does not have a spring affixed thereto. The Examiner asserted that the term "affixed" is commonly defined as "to secure something" or "to fix one thing to another." Further, the Examiner asserted that the spring/socket 230 will be affixed once the prosthesis is assembled since the assembly will prevent physical separation.

Applicants respectfully assert that spring/socket 230 of *Ralph* is not affixed to second plate 100a. Applicants would like to point out col.6, ll.11-20 of *Ralph* which states:

"upper and lower plates 100a, 100b illustrated in Figs. 3a and 3b are joined by means of a circumferential wall 120. More particularly, between plates 100a, 100b, on the exterior of the device, there is included a circumferential wall 120 which is resilient and which is provided to prevent vessels and tissues from entering within the interior of the device.

There is no teaching or suggestion in *Ralph* that spring/socket 230 is ever affixed to second plate 100a. The only reference in the entire specification of *Ralph* with respect to a spring/socket and second plate 100a is "the wider ends of washers 130 are compressibly *retained in* the interior of the device, *between* the inner surfaces 103a, 103b of the plates 100a, 100b" (emphasis added). See col.6, ll.44-46. The Examiner did not refer to this embodiment in the rejection but it is the only reference in the specification that the Applicants can point to in describing the relationship of a spring/socket to that of a second plate. Therefore, the only disclosure in *Ralph* describing the relationship of these features is that the washer is *retained in* the plates. *Retained in* does not amount to affixed thereto. There is nothing to stop second plate 100a from shifting to the left and right with respect to spring/socket 230. Plates 100a, 100b are joined by circumferential wall 120 which is *resilient* and by nature allows movement to occur between the plates and therefore between spring/socket 230 and second plate 100a.

Lastly, the Examiner cannot assert that the spring/socket 230 will be affixed once the prosthesis is assembled since the assembly will prevent physical separation. As described above, plates 100a and 100b are joined by

circumferential wall 120, and not to spring/socket 230. Without circumferential wall 120 plates 100a and 100b or 200 simply fall apart. The Examiner is confusing mere contact of spring/socket 230 and second plate 100a in *Ralph* with that of the second plate in the present invention having a spring or socket affixed thereto.

For the foregoing reasons, *Ralph* cannot be used to anticipate amended claims 13, 16, and 21. Claims 14-15, 18, 20, and 23-35 are unanticipated, *inter alia*, by virtue of their dependence from the independent claims. A dependent claim is necessarily narrower than an independent claim from which it properly depends.

Further in the Action, the Examiner rejected claims 14, 15, and 24-26 under 35 U.S.C. 103(a) as being unpatentable over *Ralph* in view of *Stubstad*. The Examiner asserts that while *Ralph* does not disclose an external plate surface as having a deflectable/deformable surface thereon, that *Stubstad* does teach such a feature.

Applicants respectfully assert that claims 14, 15, and 24-26 are unobvious over *Ralph* in view of *Stubstad* because *Stubstad* does not cure the deficiencies of *Ralph* with respect to the "convex surface" of the socket or spring confronting the inner surface of the first plate and the "concave surface" of the socket or spring confronting the inner surface of the second plate limitations. Applicant respectfully requests withdrawal of the present obviousness rejections of claims 14, 15, and 24-26 over *Ralph* in view of *Stubstad*.

In view of all of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.



If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' agent at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: October 29, 2007

Respectfully submitted,

By 

William A. Di Bianca

Registration No.: 58,653

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Agent for Applicants